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No. 853

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

MICHAEL P. GRACE, II, individually and as a Trustee under the Last Will and Testament of JANET GRACE,

Plaintiff-Petitioner,

against

TUCKAHOE, INC., REAL PROPERTY OWNERS, INC., GRACE NATIONAL BANK OF NEW YORK, GRACE PROPERTIES, INC., in Liquidation and ALBERT J. BORGUNSEN, Jr.,

Defendants,

COMMITTEE OF JANET MAUREEN GRACE, [illegible] National Bank of New York and Michael P. Grace II, [illegible] CHARLES MacDONALD GRACE, individually and as a Trustee under the Last Will and Testament of JANET GRACE, deceased, JOSEPH P. GRACE, JR., individually and as a Trustee under the Last Will and Testament of JANET GRACE, deceased, and JOHN P. BOLAND, [illegible] JANET MAUREEN GRACE,

Defendants-Respondents.

COMMITTEE'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS, STATE OF NEW YORK

[illegible]

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Supreme Court of the United States

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MICHAEL P. GRACE, II, individually and as a Trustee under the Last Will and Testament of JANET GRACE,
Plaintiff-Petitioner,

against

DEEPDALE, INC., REAL PROPERTY OWNERS, INC., GRACE NATIONAL BANK OF NEW YORK, GRACE PROPERTIES, INC., in Liquidation and ALBERT JORGENSEN,
Defendants,

COMMITTEE OF JANET MAUREEN GRACE, by Grace National Bank of New York and Michael P. Grace, II, its members, CHARLES MACDONALD GRACE, individually and as a Trustee under the Last Will and Testament of JANET GRACE, deceased, JOSEPH P. GRACE, JR., individually and as a Trustee under the Last Will and Testament of JANET GRACE, deceased, and JOHN P. BOLAND, Guardian ad Litem for JANET MAUREEN GRACE,
Defendants-Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS, STATE OF NEW YORK

COMMITTEE'S BRIEF IN OPPOSITION

Grace National Bank of New York is the committee of the property of Janet Maureen Grace, an incompetent person. The petitioner, Michael P. Grace, II, a co-member

of the committee when he began this action, has since been removed therefrom. In spite of the fact that a guardian ad litem was appointed herein for the same incompetent person, the committee was named and continued as a defendant to the action and is made a respondent in this court.

The committee asks the court to deny the writ.

Questions Presented

1. Where a litigant complains of a court's denial of his application for an adjournment in the midst of the trial of a civil action, is a federal question properly raised when the first vague mention of "constitutional rights" is made on the third trial day after the ruling, the reference is not related by the litigant to the previous ruling, and the request for adjournment is never renewed?

2. When a plaintiff in a civil action has so abused his trial counsel as to cause such counsel to decline further to confer with his client, is due process of law denied the plaintiff by the refusal of a trial court to adjourn the trial for an additional two weeks to allow the plaintiff to substitute and prepare other counsel after the plaintiff had already been given six days for that very purpose?

3. Regardless of the correctness of the ruling of the trial court, will this court grant certiorari to review a case in which the petitioner is precluded from being granted the only relief prayed for in his complaint by having himself failed to perfect an appeal against a necessary party?

Statement

The petitioner, his two brothers and his incompetent sister became co-owners of a large Long Island estate at the death of their father. For a brochure describing the

property, see Plf. Ex. 4, R. 1642. Five years ago, the co-owners entered into a contract for the sale of the property to a corporate purchaser for conversion into an eighteen-hole golf course (R. 20).

As required by law, the bank applied to the New York Supreme Court for approval of the sale in respect of the interest of the incompetent, the contract having been signed by both the bank and the petitioner in her behalf and by the latter also individually and as a trustee. The petitioner as co-committeeman refused to join in the application for approval and was made a respondent. Purporting to have come to the conclusion that the price was inadequate and alleging that he had been the victim of a conspiracy among his brothers, the purchaser and others to defraud him, the petitioner appeared and opposed court approval. After a lengthy trial of the fraud issue, the Supreme Court, Nassau County, found that there had been no fraud and that the contract was in the incompetent's best interests and ordered its consummation. This order was appealed by this petitioner to the Appellate Division of the Supreme Court and to the New York Court of Appeals. Both courts affirmed. For having contumaciously refused thereafter to close the contract and to join in a fiduciary deed to the interest of his incompetent sister, the petitioner was summarily removed from the committee of her property. The bank then closed and the incompetent received her share of the price.

The other co-owners voluntarily carried out the contract. The petitioner, while continuing to live rent-free in the 44-room mansion on the premises (R. 1352), brought a new action, the case at Bar, to set aside the contract on the ground that it had been induced by fraud, the same alleged fraudulent conspiracy which had been found non-existent in the incompetency proceedings above described.

As defendants, he joined his brothers, the contract purchaser and others. Although making no charge of fraud against his incompetent sister, nor against the committee of her property as such, nevertheless the committee was also

joined as a defendant, and the petitioner likewise obtained the appointment of a guardian ad litem to represent the incompetent. The case was tried in the same court as the prior proceeding, before a different judge.

At the opening of court on the fifth day of the trial of this action, the petitioner's counsel informed the court that his client had so treated him in a conference on the preceding evening that, as an attorney, he could no longer confer with the petitioner and he asked to be excused (R. 678). The petitioner declined to discharge his counsel, and the court refused to permit the attorney to withdraw but adjourned the trial for six days in order to permit the petitioner either to settle his differences with his counsel or to obtain substitute counsel, an action which the petitioner characterized as "very helpful" (R. 679). He was advised that the trial would proceed following the six-day adjournment.

Six days later, the petitioner appeared with two new attorneys who announced that they would take over presentation of the case, if granted an additional two weeks adjournment of the trial further to prepare. The court refused the additional adjournment and the new attorneys withdrew. It is this ruling by which the petitioner now claims he was deprived of due process of law as vouchsafed him under the Fourteenth Amendment to the United States Constitution.

The petitioner again declined to discharge his original trial counsel who proceeded to present petitioner's evidence on that day, all the next day and until noon of the third day, when the petitioner, although present in court, had a telegram delivered in open court to the judge, to his counsel and to some of the other attorneys (R. 982). The telegram starts with an admission that his attorneys, through his trial counsel, had "fought this case with unquestionable zeal and skill." Court's Ex. K, R. 2027. The rest is superficially incoherent but was intended as a direction to his trial counsel to rest his case (R. 987).

The trial proceeded, with both the petitioner and his original trial counsel in attendance. Judgment was rendered dismissing the complaint as to all defendants and granting

the contract purchaser's counter-claim against the petitioner for specific performance.

On May 7, 1958, the petitioner served and filed a timely notice of appeal from the judgment upon certain of the defendants, but *not* upon the contract purchaser. After his time to appeal had expired, the petitioner served another purported notice of appeal, this time including as an appellee the contract purchaser. Petitioner made application to the Appellate Division of the New York Supreme Court to "correct" his original notice of appeal to include the purchaser, and his application was denied. The purchaser then applied to the same court to dismiss the tardy, purported appeal. The purchaser's application was granted and the petitioner's purported appeal dismissed. These two sets of motion papers and the consequent orders of the Appellate Division are filed in this court on behalf of the committee as additions to the record filed by the petitioner.

Summary

The committee respectfully submits (a) that a litigant has no federal right to the adjournment of a civil trial in a state court in order to substitute counsel when he had quarreled with his orginal attorney, (b) that, if there were such a right, neither this petitioner nor any of his three attorneys then present in court, claimed it, and (c) that, in any event, the case, which is one to rescind a contract of sale, is rendered moot by the fact that the judgment is final and not reviewable in favor of the contract purchaser because of the failure of the petitioner to perfect an appeal as to such purchaser. The only persons left and before this court are covendors.

No Federal Question Was Decided

The Court of Appeals, State of New York, dismissed the appeal below "upon the ground that no substantial constitutional question is directly involved." App. A. to Pet., p. 1 a.

Mr. Justice Harlan granted a few days extension of time to file the petition for a writ, with a memorandum which said that he did so "despite my view that petitioner's papers disclose no federal question of substance."

Since the justice reached the above conclusion on petitioner's papers alone, no briefs in opposition to the extension having been filed, the court may wonder why it is now burdened by opposing briefs. The reason is that the petition is so inaccurate as to create a danger that it is misleading.

The case does not have in it what the petition calls a "denial-of-counsel issue." The only ruling of which the petitioner has complained or could complain is that the trial judge denied his application for a two-week adjournment in the middle of the trial to prepare attorneys which he wished to substitute for his original trial counsel so that the new lawyers might continue presentation of his case. The petitioner had quarreled with his lawyer; the court had already given him six days to secure other counsel and to proceed. When his new attorneys were refused the additional two-week adjournment and withdrew, the petitioner chose not to substitute other counsel at any time during the course of the trial, which was not concluded for another nine days, nor did he discharge his original counsel. Under such circumstances, the court refused to grant his original counsel's application to be excused and required his continued attendance in court. Indeed, the original counsel continued "with unquestionable zeal and skill," Court's Ex. K, R. 2027, to present the petitioner's case as plaintiff for some days thereafter, until directed by the petitioner to rest.

The situation was made entirely clear to the petitioner by the trial court while he, himself, was testifying. The occasion was an unimportant remark by counsel to the bank involving custody of an exhibit.

> "The Witness (The Petitioner): I take an exception to that.
>
> The Court: On whose behalf?
>
> The Witness (The Petitioner): On behalf of the witness here, because I have no counsel. I am sure

counsel here would not allow Mr. Lawther to stand up and say I received an original and he is not sure of the honesty of witnesses and several other

The Court: You have had counsel. You had three lawyers since we started here. There are four or five appeared, some of them were a little late, and I never said they could not serve but I simply would not give any further time to delay this case. However, all these lawyers I was perfectly willing to have here. So when you say you have no counsel, there have been plenty of counsel available to you.

The Witness (The Petitioner): I disagree with you, your Honor.

The Court: I know. You have a different view on that.

The Witness (The Petitioner): Reputable counsel have told me they will not come into this case under these circumstances. I have talked to many since your ruling has come down, and they have seen your ruling, and they said they are shocked as officers of the court. And I just talked to a counsel today and he said the only thing you can do is to have to proceed without counsel in a situation like this." (R. 1212-1213).

This Court may some day wish to determine that a plaintiff in a civil action brought in a state court has an absolute right to counsel. It may even wish to determine that such a litigant has an absolute right to change his counsel at will. Neither of these questions could conceivably be determined on this record.

There would appear to be absolutely nothing to justify the assumption by the petitioner and his counsel that this court should be asked to intervene in petitioner's over-litigated disagreements with his family over the price at which to sell the estate of their parents.

No Federal Question Was Raised

The ruling by the New York Supreme Court at *nisi prius* denying the petitioner's application for the additional two-week adjournment was made in the morning of October

21, 1957 (R. 706, Pet. 5). The petition cites only two pages of the Record in support of a statement that the alleged federal question was properly raised (R. 1002 and R. 1373, Pet. 8, 9). The first reference is to a statement made by the petitioner in open court on the afternoon of October 23rd. The second reference is to a statement made by him on the afternoon of October 28th. In attempting to excuse the presumably otherwise fatal imprecision of these statements, which, of course, make no reference at all to the Constitution of the United States, even in general, as distinct from the Constitution of the State of New York, the petition speaks of the petitioner as being "against his will, without counsel at the time" (Pet. 9).

Of course the only time to have raised a question, federal or otherwise, with respect to the adjournment was at the time the ruling was made, and, as will be shown, arguments addressed to the court's discretion *were* then made. The trial, however, continued throughout October 21st and 22nd and until the afternoon of October 23rd before the first alleged "raising" of an alleged "federal question" took place and then the trial continued on every business day thereafter until October 28th in the afternoon before the second such alleged "raising" took place. At no time other than at the opening of court on October 21st did the petitioner or anyone on his behalf renew the application for an adjournment of the trial in order that the petitioner might prepare substitute counsel.

On October 21st, not only was the petitioner present in court, in person, but he was far from being "without counsel at the time." The petitioner was represented by his original trial counsel, Mr. Charles Haydon for the firm of O'Dwyer & Bernstein, who took exception to the Judge's ruling and argued at length against it (R. 697-701). He was likewise represented by and there were present in court two other distinguished members of the New York bar, Mr. Charles Poletti, former Justice of the New York Supreme Court and former Governor of that State, and Mr. Ben Herzberg of the firm of Hays, Sklar & Herzberg. Both of these latter

had read the preliminary discussion with respect to substituting counsel and were in court especially to make the petitioner's application for the adjournment. Mr. Poletti, assisted by Mr. Herzberg, did so move and argued the point at length (R. 688-690, 694-695). It was not until after the court had made its ruling and after all three of Mr. Grace's attorneys had been given a special recess to confer with one another, that Messrs. Poletti and Herzberg withdrew and the trial proceeded (R. 706). Neither Michael Grace, *pro se*, nor any one of his three attorneys, all then present in court, objected to the court's ruling on the ground that it violated the Constitution of the United States in general or any specific provision thereof.

There is not a word in the opinion of Mr. Justice Marcus G. Christ, Supreme Court, Nassau County, New York (R. 1599-1625), indicating that he at any time considered that, on this or on any other ruling, the petitioner or anyone on his behalf had raised an issue arising out of the due process clause of the Fourteenth Amendment to the Constitution of the United States. The Appellate Division affirmed without opinion and the New York Court of Appeals dismissed the appeal finding "no substantial constitutional question * * * directly involved."

The Case is Moot

Petitioner did not perfect an appeal from the judgment dismissing his complaint *as against the purchaser* and awarding the purchaser specific performance. He has before this court only co-sellers with him. It is submitted as axiomatic that you may not rescind a contract in an action to which the sole purchaser is no longer a party. Whatever action this court might take if it were to review, the petitioner has precluded himself from obtaining the only relief which he has at any time claimed, viz., rescission of the contract. In consequence, not even petitioner's narrow self-interest could possibly be advanced by the granting of the writ.

Conclusion

Wherefore, the committee asks that the petition for a writ of certiorari be denied.

Dated: New York, N. Y.
May 23, 1960

Respectfully submitted,

ROBERT E. LAWTHER,
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